if it could be shown that it fell down the next day; but it ought to be shown that he had done the work according to his contract; and it is open to the defendant to prove that it was executed in such a manner as to be of no value to him."

The contract thus implied by the law to be incumbent on architects in common with all other professional men, being that they will exercise a reasonable amount of skill and care in the performance of their duties, any dereliction from these implied obligations will incapacitate them from recovering the remuneration otherwise usually accorded to their services.

Nor is an architect liable only for his own personal default. Being individually and personally trusted by his client, he is responsible also for those whom he employs in situations of a subordinate character; and therefore for his clerk of the works. No employment requiring skill or discretion can be legally delegated to another.* Nor would the fact of the employer undertaking to pay such clerk of the works discharge the architect from his liability. The subordinate is still regarded as the mere deputy or representative of his superior, who would be bound for his competency, and answerable for his conduct, on the principle of the ancient maxim *qui facit per alium, facit per se*. The architect receives remuneration for his superintendence of the works, nor would his delegation of that duty to another person, nor his neglect to keep a strict watch over that person's proceedings be covered even by the proof that such an arrangement had been well known to, or approved of, by his (the architect's) employer. Such an appointment would be purely vicarial. The clerk is a mere agent of the architect, who ought to be, and hence impliedly becomes, the accredited judge of and guarantee for his proficiency.

Our course of reading has not furnished us with any judicial decision, especially applicable to this particular point. The dictum here by analogy laid down may, however, be received with confidence.† The practice of the profession is such as to show that it admits the responsibility. Of the many cases that might be cited in support of this view, one of the most remarkable as well as more recent may suffice.

An architect superintended the erection of a chapel from his own designs, and in due course received his commission-charge upon completion of the works.

Some few years had elapsed when some material defect manifested itself in the subsidence of the roof. On examination, it appeared that the original construction of the roof, as designed by the architect, had been varied by the builder, either with the consent, or through the carelessness of the clerk of the works, and that the default now becoming apparent, had been occasioned by these variations in its construction. The architect, at once acknowledging his liability, defrayed the costs of reinstatement.

When the architect's certificate is made a conditional precedent to the payment of a builder's bill, the latter cannot recover in an action without producing it; and this will be the rule whether such action be brought upon a contract or on an *ad valorem* charge. It is the usual practice to make the architect's certificate a condition precedent to payment in every builder's agreement; and in such a case, an account, the items of which are merely checked by the architect, and by him forwarded to his employer, will not amount to a certificate sufficient to satisfy such a condition, and to give the builder right of action.‡ The certificate must state decidedly and unequivocally that the builder is entitled to a certain sum of money.

But although the architect's certificate is thus, in the great majority of cases, rendered necessary to the builder before he can recover his demand, he is not utterly without remedy when that certificate has been unfairly withheld or unreasonably refused. It seems certainly very doubtful whether any action at law could be sustained against an architect to compel the granting of a certificate. But a bill in chancery might be filed to enforce the special performance of that portion of his duty; and unless he could then show satisfactorily that his refusal was justifiable under the peculiar circumstances of the case, he would undoubtedly be desired to grant it. Until, however, it has been procured by some means, and is produced, it is quite clear that no action can be maintained, unless it can be shown that the defendant himself prevents the plaintiff from complying with the condition; or that the condition itself has become impossible of fulfilment, as in the case of the death of the architect.* The hardship entailed upon the plaintiff, by making the doing of an Act by a third party essential to complete his right of action, forms no just ground for complaint, since he himself voluntarily assented to the contract upon these terms; and having once agreed to such a stipulation, he will not be allowed afterwards to repudiate it, simply because it has become inconvenient.

The remuneration of an architect has long been a *vexata quæstio*. Nor has the law laid down any fixed principles by which it may be generally estimated. The profession have endeavoured to establish a customary scale of charges by commission on the outlay, amounting in the aggregate to five per cent.,† generally subdivided thus,—

Plans.....	1½ per cent.
Estimate	1½ ,,
Specification.....	1½ ,,
Superintendance ..	1½ ,,

This scale, however, has never been recognised in our courts. Indeed, it is questionable whether it should be so recognised, at least in its details, which, although promulgated by those who rightly ought to be the fittest judges and protectors of their own interests, are manifestly unequal and unjust. Surely the study, thought, and time bestowed upon the preparation of a plan worthy to be adopted, and fit to be exactly carried out, is worthy of a higher reward than the per centage here accorded it. Again, the specification is a work of labour, to which the estimate is merely supplementary. Least of all is the superintendence entitled to the same remuneration.

The courts have long and pertinaciously endeavoured to avoid a recognition of this per-centage principle; and even its most strenuous supporters must allow that some objections to it stand upon a broad and stable basis. In such a standard of remuneration (say its opponents), the architect engaged to guard the interests of his employer finds a direct incentive to neglect, if not to treachery. His profit is proportionate to the expenditure, not to the saving. His wits are exercised in daily contravention of his own interests. All his experience is directed to his own detriment. His honesty can be rewarded only by a correspondent diminution in its recompense. Perpetual self-denial only entails continual self-sacrifice; whilst the temptation is at once certain in its realisation, and secure of its enjoyment.

To these most matter-of-fact and plausible objections, it is but an indifferent reply to urge that every architect acquires reputation, and its consequent advantages by the economy which he exercises in the execution of his designs. This is a proposition which experience has failed to prove. Even were such success the certain and unfailing consequence of uniform adherence to the strict path of duty, many would still be found more anxious to secure immediate advantage, than to live on in faith of fame deferred. The world must change its ways much before honesty becomes the rule, and want of it, the exception.

Faulty, however, as we all must acknowledge the per-centage principle to be, and determined as has been the opposition of the legal authorities to its establishment; it finds general favour with the public, and is practically adopted by all juries. Lord Denman, in a recent case,‡ in vain inculcated his anti-commission doctrines upon the jury, who, nevertheless, gave the prescribed commission on a *quantum meruit* count; and on a subsequent motion for a new trial, the court refused to nullify the verdict. So, in a similar case* before Lord Ellenborough, that eminent judge left it to the jury to say whether the mode of charging by commission was vicious or unreasonable, and if they thought it so, to deduct from the damages accordingly. But, although he hinted his own disapprobation of the principle, the jury sanctioned it by giving the plaintiff a verdict for the full amount of his claim. Lord Kenyon held that a commission-charge was not recoverable as such.

Amongst the various suggestions which have been lately put forward as actually tested by successful practice, is that of a direct establishment of a contract between the parties, by the delivery of a card of terms at the time of engagement. This remedy, however, seems worse than the disease. No professional man would wish to commence an acquaintance with a collision so immediately in view—whilst such an intimation of suspicion must be equally distasteful to his employer. It might, perhaps, place architects on higher ground with their employers, and certainly it would be more just to themselves, if the per centage were attached to the estimated, instead of the actual cost. Such an arrangement could in no manner prejudice the client, whilst the architect would feel a double pride in exercising his disposition for economy, when certain of its full appreciation, and many bickerings would be removed from both. In default, however, of the substitution of some better and more equitable scheme for that which now exists, architects must rest content with the per-centage system; nor will they generally be disappointed in submitting their fair claims under that customary compensation to the decision of a jury.†

The architect's right to remuneration accrues, in case of an express contract, only upon completion of his duties. Such remuneration being contingent on benefit to be derived by the employer from services rendered, no reward will be due until the employer has actually obtained some definite advantage.‡ Where, however, the contract is only implied and not expressed, the architect will be justified, after the expiration of a reasonable time, in refusing to continue his labours unless he be paid a sum on account proportionate to the work already performed.§ He may, moreover, on refusal, throw up his engagement, and recover to the extent of such work, on *quantum meruit*.

The practice of competition having of late been much extended, it may be well here to observe that there does not appear to be any copyright in architectural designs.¶ Nor can any remuneration as for work and labour done, be recovered from any committee or individual who may have advertised for plans and estimates to be sent in upon the usual terms of competition. Architects thus invited to submit designs for any particular object, and complying with such invitation, are altogether without remedy in respect of compensation for the time and labour bestowed upon them. And this, even although the amount of reward may be specified, and the particulars and requisitions of the parties advertised strictly adhered to. Nor is it incumbent on the advertisers to select any one design, to justify their exclusion or rejection of the others; since the parties soliciting the competition have impliedly constituted themselves

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* *Eno v. Truscott*, 2 M. and W.—385.

† On this subject see also "Story on Agency," pp. 12-14.

‡ *Morgan v. Birnie*, 3 M. and Sc. 76—9; 1 Bing. 672. See also *Worsley v. Wood*, 6 T. R., 710; and *Bradley v. Mines*, Bing. N. C., 644; 1 Scott, 626—697.

* See *Holkam v. The East-India Company*, 1 P. R., 636; *Davis v. Mure and Others*, cited id. 612; and *Jones v. Berkeley Douglas*, 665.

† The fire-officers pay their surveyors 5 per cent. on all works executed, and 2½ per cent. on all works estimated, but not executed; the examination of premises, &c., being covered by a salary.

‡ *Mayor v. Ward*, 10 *Jur.*, 796.

* *Chapman v. De Tastet*, 2 Stark. 391.

† In fact, the remedy rests with those whose interests are said to suffer most under the existing state of things. When the Society of Auctioneers found their proceedings hampered by the difficulty of establishing a general and satisfactory scale of charges, the most influential men amongst them met together, and having drawn up such a scale as they considered fair, put it forth for the adoption of their brethren, as the scale which they would invariably adopt, and which they were ready and willing to support by their evidence as fair and reasonable. Why should not the architects adopt a similar course?

‡ *Hughes v. Lessing*, 8 Mee. and W., 183—and *Rees v. Lines*, 6 C. and P., 126. Coleridge.

§ Architects engaged on large undertakings are usually paid 5 per cent. on the amount of the builder's bills, certified by them in the progress of the works.

‖ *Roberts v. Hazeldock*, 3 B. and Ad., 404.

¶ It does not appear that any copyright is reserved to *pictures*. Strange as the omission may seem, the invention is left unprotected, whilst the publication of the invention (by means of an engraving) vests a right in either publisher or author, under the 7 Geo. III., c. 38.